

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE ZACKERY,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2011

No. 296961

Wayne Circuit Court

LC No. 09-022857-FC

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of careless, reckless, or negligent use of a firearm resulting in death, MCL 752.861, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 11 to 24 months for the careless use of a firearm conviction, and two years for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the August 30, 2009, shooting death of Lamar Cottingham in Detroit. The victim was attending a wedding reception at a hall across the street from a motorcycle club. An altercation ensued among the wedding guests outside the hall, and then between certain wedding guests and certain motorcycle club members. Defendant, the president of the motorcycle club, fired a warning shot in the air, presumably to stop the melee. Defendant's gun thereafter discharged a second time and the victim was fatally shot in the head. Conflicting testimony was presented concerning defendant's actions and the circumstances surrounding the shooting. Defendant was charged with second-degree murder, two counts of felonious assault, and felony-firearm. Defendant presented defense theories of self-defense and accident. The jury was instructed on involuntary manslaughter and careless use of a firearm as lesser offenses of second-degree murder. The jury acquitted defendant of the two felonious assault counts, and found him guilty of the lesser offense of careless use of a firearm, in addition to felony-firearm.

**I. JURY INSTRUCTIONS**

Defendant first argues that he is entitled to a new trial because the trial court failed to instruct the jury that the misdemeanor offense of careless, reckless, or negligent use of a firearm could not support a felony-firearm conviction.

A person is guilty of felony-firearm if he possesses a firearm during the commission or attempted commission of a felony. MCL 750.227b(1). Thus, commission of a misdemeanor alone cannot support a felony-firearm conviction. See *People v Baker*, 207 Mich App 224, 225; 523 NW2d 882 (1994). However, conviction of a felony is not an element of felony-firearm, MCL 750.227b, and a jury may reach an inconsistent verdict with regard to a felony-firearm charge. *People v Lewis*, 415 Mich 443, 449-452; 330 NW2d 16 (1982). Thus, a defendant may be convicted of felony-firearm if he is convicted only of a misdemeanor as a lesser offense of a charged felony. *People v Bonham*, 182 Mich App 130, 136; 451 NW2d 530 (1989).

In this case, the trial court instructed the jury on the charged count of second-degree murder, and the lesser offenses of involuntary manslaughter and careless, reckless, or negligent use of a firearm. With regard to the felony-firearm charge, the trial court instructed the jury as follows:

[T]he defendant finally is charged in count four with Possession of a Firearm at the time of the commission of a felony, what we call Felony Firearm. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt: First, that the defendant committed or attempted to commit the crime of Murder in the Second Degree, its lesser included of Voluntary Manslaughter, *or the other lesser included of Reckless Discharge* and or the both counts of the Felonious Assault, all of which I've just previously defined for you. It is not necessary, however, that the defendant be convicted of any of those crimes. Second, that at the time the defendant committed or attempted to commit those crimes he knowingly carried or possessed a firearm. [Emphasis added.]

Following the trial court's instructions, defense counsel stated, "Defense is satisfied with the jury—with the instructions as read." During deliberations, the trial court reread the same felony-firearm instruction at the jury's request.

Because defendant specifically expressed satisfaction with the trial court's instructions, he has waived appellate review of this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant's waiver extinguished any error. *Id.* at 216. Further, a waiver is distinguishable from a forfeiture of an issue that arises from a failure to object. As explained in *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999):

"Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." [Quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Therefore, because defense counsel expressed satisfaction with the trial court's jury instructions, defendant has waived this issue, thereby extinguishing any error.

## II. SENTENCING

Defendant next argues that he is entitled to be resentenced because the sentencing guidelines range for his careless use of a firearm conviction was 0 to 11 months and, instead of

sentencing him to an intermediate sanction, the trial court imposed a prison sentence without articulating substantial and compelling reasons for the sentence. While we agree that this would normally be the case, under the circumstances of this case, the error is harmless.

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the sentencing guidelines range. MCL 769.34(2) and (3). In this case, the sentencing guidelines range was 0 to 11 months. If the upper limit of the recommended range is 18 months or less,

the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. [MCL 769.34(4)(a).]

Even though the 11-month minimum sentence does not exceed the upper end of the guidelines range, MCL 769.34(4)(a) required the trial court to impose an intermediate sanction unless it stated a substantial and compelling reason to impose a prison sentence. The court did not set forth any substantial and compelling reasons for its sentence.

Because the sentence is concurrent to the mandatory two-year term on the felony-firearm conviction, defendant will have completely served his careless use of a firearm sentence by the time he completes his felony-firearm sentence. Moreover, it would appear that he has already served the minimum on the careless use sentence. Therefore, there is no remedy that could be fashioned. Indeed, any “remedy” for the “error” would be to defendant’s detriment—he would serve his two years in prison and then be returned to Wayne County to begin any jail term the trial court imposed on the careless use conviction.

### III. DEFENDANT’S STANDARD 4 BRIEF

Defendant raises several additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

#### A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to request a self-defense instruction specifically for the felony-firearm charge. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent from the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel’s error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

After instructing the jury on second-degree murder, and its lesser offenses, the trial court instructed the jury on self-defense. The trial court next instructed the jury on the two felonious assault counts, and again instructed the jury on self-defense as it related to those counts. Thereafter, the court instructed the jury on felony-firearm, but did not repeat the self-defense instruction. Defendant now argues that defense counsel was ineffective for not objecting to the trial court's failure to separately instruct the jury on self-defense as it relates to the felony-firearm charge. We disagree.

Jury instructions are reviewed as a whole, in their entirety, to determine whether any error requiring reversal occurred. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). Imperfect instructions will not warrant reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.* The trial court instructed the jury that, to convict defendant of felony-firearm, it must find that he committed one of the substantive offenses, for which the jury was instructed on self-defense. Although a self-defense instruction was not repeated after the felony-firearm instruction, the instructions as a whole conveyed that defendant could not be convicted of felony-firearm if the jury found that he did not commit one of the other substantive offenses because he acted in self-defense. Because the jury instructions fairly and completely presented the issues to be tried and protected defendant's rights, defense counsel was not ineffective for failing to object or request a separate self-defense instruction for felony-firearm.

#### B. SUFFICIENCY OF THE EVIDENCE

Next, we reject defendant's argument that the evidence was insufficient to support his felony-firearm conviction. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Wolfe*, 440 Mich at 514. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant essentially argues that the jury should have believed the defense version of the events, and disbelieved any contrary accounts that did not support his claim of self-defense. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was not acting in self-defense when he discharged his gun. It is undisputed that defendant possessed a firearm during the criminal episode. Further, one witness testified that after hitting the victim in the head with the gun and the victim falling to his knees, defendant "stood in front of him and he shot him." Another witness saw defendant stand over the victim with the gun pointed in a downward angle toward the victim, saw the victim try to get up, and then saw defendant shoot the victim. Another witness saw the gunman "shimmy[] back" from the victim and shoot him from about six feet away. Depending on which witnesses the jury believed, it could rationally find that

“defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). While defendant emphasizes only favorable testimony, questions concerning the weight of the evidence and the credibility of witnesses are appropriately left to the trier of fact. *Wolfe*, 440 Mich at 514. Consequently, the evidence was sufficient to sustain defendant’s felony-firearm conviction, notwithstanding his claim of self-defense.

### C. REASONABLE DOUBT INSTRUCTION

Defendant lastly argues that the trial court’s reasonable doubt instruction was inadequate. The trial court’s reasonable doubt instruction was modeled after CJI2d 3.2(3). This Court has held that CJI2d 3.2 adequately conveys the concept of reasonable doubt. See *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003), and *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002). Regardless, as discussed in section I, *supra*, defendant expressed satisfaction with the trial court’s instructions, thereby waiving the issue and extinguishing any error. *Carter*, 462 Mich at 215-216.

Affirmed.

/s/ Elizabeth L. Gleicher  
/s/ David H. Sawyer  
/s/ Jane E. Markey